Hercules Drawn Steel Corp. *and* Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Cases 7–CA–48573, 7–CA–48785, 7–CA–49221

February 7, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On December 8, 2006, Administrative Law Judge George Alemán issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

The judge found, among other things, that the Respondent did not violate Section 8(a)(5) of the Act by generally engaging in direct dealing with employees it recalled from a lockout. The Charging Party excepts. We agree with the judge's finding, for the reasons fully set forth in the judge's decision. The Charging Party also excepts to the judge's failure to find that the Respondent engaged in unlawful direct dealing with employee Kenneth Lewis in particular when it recalled him to a different position, at a different salary, than he had prior to the Respondent's lockout. The Charging Party excepts to the judge's failure to address this contention, and argues that the Respondent's conduct in this regard violated Section 8(a)(5) of the Act. For the reasons set forth below, we find that the Respondent's recall of Lewis did not violate the Act.

The facts, as set forth more fully in the judge's decision, are as follows. The Respondent, which manufactures steel products, began negotiations with the Charging Party Union for a new collective-bargaining agreement in April 2005.[4] On May 1, no agreement having been reached, the Respondent locked out its employees. In response, the employees set up a picket line outside the facility.

During the lockout, the Respondent attempted to continue its steel production by hiring temporary replacements and using management personnel. However, the

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Charging Party contends that some of the judge's findings and comments at the hearing demonstrate bias in favor of the Respondent. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

In section II.A.1 of his decision, the judge referred to the hi-lo operators as "skilled" positions although the credited testimony characterizes them as "support" positions. He also stated that the Respondent's plant manager, Kenneth Pinion, called Union Chief Steward Mike Goodreau concerning the Respondent's recall of its employees. Both the credited testimony and the judge's preceding recitation of facts, however, establish that the Respondent's superintendent Jean Rincher contacted Goodreau. Further, in section II.B.1.a of his decision, the judge noted that he had earlier credited Pinion's denial of having threatened to fire any employee who showed support for a suspended employee. However, apparently inadvertently, the judge did not actually set out this credibility resolution earlier in his decision. Nonetheless, these misstatements are harmless errors that do not affect the ultimate results of the judge's decision.

In adopting the judge's finding that the Respondent's selective recall of its employees from a lockout was not unlawful, we find unavailing the Charging Party's reliance on *Electrical Workers Local 15 v. NLRB*, 429 F.3d 651 (7th Cir. 2005), cert. denied 127 S.Ct. 42 (2006) (Mem). There, the court found that an employer's partial lockout was unlawful, stating that "to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." Id. at 659. Here, the Respondent showed that it could not maintain production during the lockout without specific "skilled" employees to operate its machinery. The credited testimony established that the Respondent's selective recall was necessary to maintain production and avoid the loss of material, and clearly established a legitimate and substantial business justification for the partial lockout. See *Bali Blinds Midwest*, 292 NLRB 243, 246–247 (1988); *Laclede Gas*, 187 NLRB 243, 243–244 (1970). There was also no showing that the Respondent based its selection of employees for recall on their union affiliation or activity. All of the recalled employees were members of the bargaining unit represented by the Union, and two of the recalled employees—Union Steward Goodreau and Union Committeeman Wilson—were members of the Union's contract negotiating committee. Furthermore, there was no showing that employees in certain job classifications were more active or less active in union or other protected activity than employees in other job classifications.

[2] In his decision, the judge found that the Respondent's surveillance of employees' union activity violated Sec. 8(a)(1). There are no exceptions to this finding. In his conclusions of law, however, the judge inadvertently stated that the Respondent's surveillance also violated Sec. 8(a)(5). We hereby correct the conclusions of law to reflect the judge's finding that the Respondent's surveillance violated only Sec. 8(a)(1).

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Section 3(b) of the Act.

[4] All dates are in 2005, unless otherwise indicated.

Respondent was unable to secure replacements for certain skilled positions, resulting in diminished production and lost material. In order to maintain its level of production, the Respondent selectively recalled certain employees to these positions.

Although some of the Respondent's "skilled" employees accepted the Respondent's recall request, many refused and continued to picket the Respondent out of solidarity with the "support" workers, who remained locked out. Among those who refused recall were the Respondent's Schumag operators who ran the 4D line, the Respondent's fastest steel production line.

At the time of the lockout, Kenneth Lewis was working for the Respondent as a coil-end operator. He had previously worked as a Schumag operator on the Respondent's 4D line.[5] On July 2, the Respondent's plant manager, Kenneth Lee Pinion, called Lewis at home and offered to recall him as a Schumag operator on the 4D line. Lewis asked why he was being chosen over the other 4D line Schumag operators. Pinion answered that those operators had not responded to the Respondent's recall request.[6] Lewis then asked about two other Schumag operators who had not worked on the 4D line but who had more seniority than Lewis. Pinion responded: "Right now we need someone who can run the 4D." Pinion requested that Lewis begin working on July 11. Lewis asked to begin work on July 12, and Pinion agreed. The Respondent did not offer to bargain over employment terms for Lewis' 4D line position, but applied the same terms that prevailed for that position before the lockout.

As mentioned above, the judge found that the Respondent did not engage in unlawful direct dealing in connection with the partial recall of its employees. In support, the judge explained that, with the exception of Lewis, the Respondent had merely recalled employees to their former positions. However, the judge did not address whether Lewis' recall to a different position at a higher salary constituted unlawful direct dealing. Addressing this issue, we find that Lewis' recall was not unlawful.

An employer's direct communication with its employees about terms and conditions of employment is unlawful when it "is likely to erode the union's position as exclusive representative." *Armored Transport, Inc.*, 339 NLRB 374, 376 (2003); *U.S. Ecology Corp.*, 331 NLRB 223, 226 (2000), enfd. 26 Fed. Appx. 435 (6th Cir. 2001) (internal citations omitted). The Board will find that such employer communications violate Section 8(a)(5) if those communications are coercive or constitute direct bargaining between the employer and represented employees. *Armored Transport*, above. Here, no evidence suggests that the Respondent's communication with Lewis was likely to have any material effect on the Charging Party's status as the employees' exclusive representative. In so finding, we note that the Respondent's 4D line Schumag operators did not accept the Respondent's offer of recall. Thus, as the judge found, they were no longer locked-out workers but had become economic strikers.[7] In order to maintain operations during the strike, the Respondent asked Lewis, who was qualified to perform the work, to fill the 4D line Schumag operator position "right now." In sum, we find that the Respondent's dealings with Lewis amounted to nothing more than a lawful effort to maintain production in the face of the other 4D line Schumag operators' failures to respond to the Respondent's recall. In particular, we observe that the Respondent contacted the more senior 4D line Schumag operators and either offered or attempted to offer them the work before offering the position to Lewis. In these circumstances, we find that the Respondent's discussions with Lewis, which consisted simply of advising him of the situation and asking him to return to work, did not amount to unlawful direct dealing. The Respondent's action was tantamount to the reassignment of its struck work, which is clearly permissible under the Act. *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 345–346 (1938).

In these circumstances, we find nothing about the recall of Lewis that establishes that the Respondent engaged in unlawful direct dealing. Accordingly, we find that the Respondent did not violate the Act as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Hercules Drawn Steel Corporation, Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 7, 2008

Wilma B. Liebman, Member

[5] About 5 years before the lockout, Lewis stepped down from the Schumag position for performance-related reasons.

[6] In its exceptions, the Charging Party states that Pinion told Lewis that the former 4D line Schumag operators "haven't been recalled." However, the uncontradicted testimony establishes that Pinion told Lewis that the former 4D line operators "haven't called."

[7] In adopting the judge's finding that the locked out employees who refused to return to work after being recalled were not unfair labor practice strikers, we agree with the judge's findings that the allegedly unlawful treatment that the strikers were protesting did not, in fact, occur.

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donna M. Nixon & Jennifer Y. Brazeal, Esqs., for the General Counsel.
David B. Gunsberg, Robert J. Finkel, & Michael L. Weissman, Esqs., for the Respondent.
Lisa M. Smith, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to a second consolidated complaint issued on March 9, 2006, by the Regional Director for Region 7 of the National Labor Relations Board (the Board), a trial in this matter was held from May 15–18, and on June 21, 2006, in Detroit, Michigan, to hear and resolve allegations that Hercules Drawn Steel Corp. (the Respondent), had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1]

Specifically, the consolidated complaint alleges that the Respondent violated Section 8(a)(1) by threatening employees with loss of jobs if they went on strike; if they supported a another employee who had been disciplined; threatened them with unspecified adverse action if they filed a grievance or if they gave statements against it in support of other employees; threatened employees with job loss if they did not accept its contract proposals; by engaging through videotaping in the surveillance of employees engaged in picketing; by threatening employees with discharge if they did not accept their selective recall from a lockout and return to work, and by threatening employees by telling them that it did not want back those employees who had not been selectively recalled from the lockout.

It further alleges that the Respondent violated Section 8(a)(3) and (1) by making unfavorable and discriminatorily motivated work assignments to an employee, Lawrence Lewis, by locking out employees on May 1, 2005;[2] and by selectively recalling from lockout employees in certain job classifications.

Finally, the consolidated complaint alleges that the Respondent violated Section 8(a)(5) and (1) when, in or around late May or early June, it bypassed the Union and dealt directly with certain employees in selectively recalling them from the lockout; and by presenting the Union on August 9, with regressive contract proposals, which conduct is further alleged to have been "inherently destructive" of the rights guaranteed to employees by Section 7 of the Act.

By answer dated March 20, 2006, the Respondent denied engaging in any of the unfair labor practices alleged in the consolidated complaint, asserting, inter alia, that it had legitimate, nondiscriminatory and/or substantial business reasons for taking any and all action alleged as unlawful in the complaint.

At the hearing in this matter, all parties were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following[3]

I. FINDINGS OF FACT

JURISDICTION

The Respondent is a corporation with an office and place of business in Livonia, Michigan, where it is engaged in the manufacture of steel products. During the 2004 calendar year, a representative period, the Respondent purchased and received at its Livonia facility materials and supplies valued in excess of $50,000 directly from points and places outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. Factual Background

The Respondent, as noted, is in the business of manufacturing steel products. Essentially, it produces steel bars which it sells to companies that use the steel bars to make screws and other parts. Mark Goodman is the Company's owner and president. Kenneth Lee Pinion serves as plant manager, Jean Rincher is the Respondent's plant superintendent and reports to Pinion. Below Rincher in the supervisory/managerial hierarchy are all of the supervisors at the Livonia plant, which include Maintenance Supervisor Kerry Morley, and Shift Supervisors Perry Sanford, Jim Ritchie, Bob Giacherio, and Stanley Gulaszewski. All are admitted supervisors within the meaning of Section 2(11) of the Act.

The Respondent and the Union have had a longstanding 30–40 year bargaining relationship, during which period the Union has served as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by the Respondent at its Livonia facility.[4] The parties' most recent collective-bargaining agreement covered a period from April 29, 2000 to April 28, 2005.[5]

[1] The unfair labor practice charges, and amendments thereto, which gave rise to the second consolidated complaint were filed by Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO (herein the Union) on various dates between January 3 and April 27, 2006. The first consolidated complaint was issued on October 28, 2005.

[2] Unless otherwise indicated, all dates herein are in 2005.

[3] Various documents were offered into evidence by the parties. The General Counsel's exhibits are identified herein as "GC Exh.", the Respondent's exhibits as "R. Exh", and the Union's or Charging Party's exhibits as "CP Exh," followed by the exhibit number. Testimonial evidence is identified as "Tr." (transcript) followed by the page number(s). Reference to arguments made in the parties' briefs are identified as "GC Br." for the General Counsel's brief, "R. Br." for the Respondent's brief, and "CP Br." for the Charging Party's brief, followed by the brief page number(s).

[4] The job classifications included in the production and maintenance unit are maintenance, tool crib, wean line/roto-schumag, bar blast & coil end, lift truck, and radio-crane operator. Of these, the schumag operators, wean operators, testers, and maintenance are considered skilled jobs. The several job classifications included in the production

In early April, the parties began negotiations for a new contract. The Union's bargaining committee consisted of Joseph Hayosh, its lead negotiator, employee and Chief Steward Mike Goodreau, employee Herb Wilson, employee Lawrence Lewis (L. Lewis), and employee and Union recording secretary, Cliff Parmenter. The Respondent's bargaining team included attorney David Gunsberg, Pinion, Rincher, and Ron Ruitt, Respondent's controller. Hayosh testified that the parties met for bargaining eight times in April, twice in May, and once in June, August, September, October, and November. (GC Exh. 26).

Attorney Gunsberg, one of the Respondent's negotiators, has represented the Respondent in previous contract negotiations with the Union. He testified that early on in the negotiations for the new contract, the Respondent presented the Union with economic and noneconomic proposals but that, with some exceptions, the parties were unable to reach agreement on a number of issues.[6] Among the changes sought by the Respondent and opposed by the Union in the new contract was a blanket no-strike clause without the "health and safety," and "production" exceptions, "super seniority" for layoff and recall purposes for employees in the skilled classifications, changes in certain work rules to reduce the number of steps needed before discharge could be imposed, future increases in health care premiums to be paid by employees, and changes in the wage and COLA structures. (Tr. 887; 944–945; 194).

On April 26, the parties agreed to extend the contract by 1 day, to April 29. On April 28, the Respondent presented the Union with its final proposal. (See, GC Exh. 8). Hayosh testified that when his bargaining committee was handed the proposal, as well as during a sidebar conversation with him and a mediator, Gunsberg stated that if the employees turned down the Company's final proposal, there would be a lockout. Hayosh, however, told Gunsberg that the employees would not strike and would continue working even if they were to reject the Respondent's final contract proposal. On April 29, Gunsberg faxed the Union a letter reiterating that the April 28 proposal was the Company's final proposal, and that it reflected what the Respondent felt it needed to enter into a collective-bargaining agreement. In his letter, Gunsberg insisted that the Respondent would not agree to a contract with a "no strike" clause with exceptions for health and safety and production standards, despite the position allegedly taken by the Union during the April 27 negotiations that it intended to keep the exceptions to the no-strike clause and that said position was set in concrete. The letter further advised that if no agreement was reached by the start of the midnight shift on May 1, employees should not report for work. (CP Exh. 12).

Hayosh responded with a letter of his own dated April 29, disputing Gunsberg's characterization of the Union's position regarding the "no strike" clause, and noting that while it preferred to maintain the current exceptions to the "no strike" clause, the Union was "willing to consider the modifications you have proposed on this issue." (CP Exh. 13). Gunsberg faxed Hayosh a letter that same day responding to certain assertions made by Hayosh during a phone conversation between the two, and reiterating that the Company's final proposal was indeed final, that it viewed the final proposal as fair, that the restrictions previously placed on the Company under the expired contract were untenable, and that it was not willing to enter into a new contract with such restrictions. The letter stated that the Company was not willing to make any further concessions. Gunsberg also denied in his letter a claim purportedly made by Hayosh during their phone conversation that employees were told by supervisors that the lockout was to be a selective one, that is, it would apply only to certain unit employees. He pointed out that if no agreement was reached by 11 pm, Sunday, April 30, all unit employees would be locked out. (CP Exh. 14).

On April 30, the Union met with employees to vote on the Respondent's contract proposal. At that ratification meeting, Hayosh told employees that if the Respondent's proposal was not ratified, they would be locked out. (Tr. 621). The proposal was rejected by a vote of 62–2, after which Hayosh notified Pinion of the vote.

1. The lockout and subsequent negotiations

Following the union meeting, employees scheduled to work the 11 p.m. shift that day appeared at the facility, accompanied by Hayosh and the bargaining committee, to report for work. On arriving, they were met at the door by Pinion and Gunsberg, and some security guards retained by the Respondent through Huffmaster Security. Pinion told Hayosh and the employees that there would be no work without a contract. (Tr. 815). Pinion recalls that John McIntosh, a millwright employee, had a video camera with him and videotaped this exchange between him and the employees. Hayosh and the employees then went to their vehicles and retrieved signs reading, "UAW locked out," and began picketing in front of the Respondent's facility. Goodman explained that he alone made the decision to lock out the employees and that he did so in order to pressure the Union into signing a contract.[7] Pinion testified, and Hayosh confirmed, that the Union was advised by attorney Gunsberg during negotiations that a lockout would ensue if no contract was reached.

Hayosh and several other employees testified that when the lockout began, they picketed several times a week between May 1 and July 1, and that, during that period, the security guards were always present, at least one of whom had a video camera and allegedly videotaped the employees' activities. Hayosh, for example, recalls seeing a "couple" of guards with video cameras "pointed at the picket line." Wilson testified to seeing one, and on occasion, two guards standing some 10 to 15 feet away with video cameras pointed directly at the picketers as they walked back and forth. Employee Paul Nowicki recalls

and maintenance unit are maintenance, tool Crib, wean line; crane, lift truck, coil-end, shumag, roto/mag, and blast. (See GC Exh. 6, p. 48; GC Exh. 38). There are roughly about 70 employees in the unit.

[5] GC Exh. 6, the parties' 2000–2005 contract, was entered into between the Respondent and UAW Local 985. Midway through the contract term, Local 985 merged into Local 174.

[6] The parties were able to agree on increases in life insurance, health and safety insurance, and on installation of a buzzer for lunch and break periods.

[7] During the 2000 contract negotiations, the Respondent also conducted a 1-day lockout which led to the agreement that expired in April.

seeing guards, mostly one at any single time, with video cameras filming from far away and from close-up positions the picketers and the traffic entering and leaving the plant. He claims that one of the guards, in fact, stood right in front of him about a foot away filming his face. L. Lewis recalled seeing one guard standing some 15 feet away taking panoramic type video of employees on the picket line. Employee Richard Sihler testified to seeing two guards with video cameras, that the guards were standing about a foot away, and that "they were putting the cameras in our face and videotaping us." (Tr. 48; 203; 345–346; 395; 634).

Called as a witness by the Respondent, Huffman security's senior field coordinator, Charles Young, confirmed that he used videographers at the Respondent's facility during the Union's picketing, that he did so without any request from the Respondent, that the guards videotaped vehicles entering and leaving the facility, and that its purpose was to protect against the possibility of assault against him, his guards, or damage to vehicles. He denied that any videographer ever got into the strikers' faces. (Tr. 930–931). No videotapes were produced at the hearing, and no claim was made by Young or the Respondent that the videotapes do not exist or were not readily available for production. It would have been a simple matter for the Respondent to request from Young, and to produce at the hearing, the videotapes taken by the Huffman security guards during the time in question to ascertain just what the Huffman guards had recorded. Accordingly, I credit the mutually corroborative accounts of the various employee witnesses and am convinced that the videotaping by the Huffman guard(s) was not limited to the recording of traffic entering and/or leaving the facility but rather extended to the picket line activity engaged in by employees.

Between May 1, when the lockout began, and May 24, the parties' next bargaining session, the Respondent sought to continue production by hiring some ten temporary replacement employees at $14.50/hr. to perform support functions such as banding up bundles, writing tags, loading coils, tasks generally performed by unit employees classified as hi-lo, bar blast, coil-end, and crane operators. The Respondent also attempted to run four of its five production lines during one of its three shifts using management personnel to operate the machinery.

Pinion testified that, prior to the lockout, the Respondent drew up contingency plans to staff the plant in the event of a labor disruption that included placing help-wanted ads in local newspapers seeking individuals for the skilled positions of hi-lo operators, schumag and machine operators, wean line machine operators, and overhead remote control crane operators. The ads, he contends, ran during the last week in April and the first week in May but were not very successful in drawing the skilled job candidates sought by the Respondent.

On May 24, the parties, as noted, met for another bargaining session. Goodman, Pinion, and Gunsberg were present for this meeting. Pinion recalls Goodman telling the Union that he wanted to end the lockout and urged it to sign the contract containing the Respondent's April 28 final proposal. (Tr. 830). According to Pinion, while the Union did make some proposals during this meeting, the parties nevertheless remained far apart on major issues.

Soon after the May 24 meeting, Respondent hired additional temporary employees, and Goodman made a decision to recall some of its machine operators and some of its maintenance employees back to work. Goodman testified, credibly and without contradiction, that he did so because the Company was unable to meet its production demands with the temporary personnel it had hired and the limited production lines it was running, and because it had been unable to hire the skilled workers required to maintain full production and meet customer demands.

Goodman's description of the production problems the Respondent experienced following the lockout was corroborated by Pinion. Thus, Pinion testified, credibly and without contradiction, that during normal production prior to the lockout, the Respondent ran three shifts, that on two of those shifts all five of its production (wean and schumag) lines were in operation, and that on the third shift, the Wean line and two schumag lines were run. He explained that during the first few weeks of the lockout, using, as previously discussed, management personnel to run the machines and temporary hires as support personnel, the Respondent was able to produce approximately 2500 tons of steel, or about one-fourth of its normal pre-lockout monthly production level of 10,000 tons.[8] Further, according to Pinion, the Respondent also had in its inventory when the lockout began approximately 18,000 tons of steel that needed to be processed within 90 days before it began to "pit" or deteriorate. He testified that due to Respondent's inability to continue normal production levels following the lockout, some 4000–5000 tons of that inventory was lost. (Tr. 820–821).

Goodman instructed Pinion to recall the skilled employees back to work, and Pinion, in turn, directed Rincher to begin recalling the maintenance (millwright) employees, and the wean and Schumag operators. Rincher testified that the first person he notified of the recall was Goodreau, the Union's chief steward. He recalls phoning Goodreau at his home and leaving a message on his answering machine asking him to report for work, and then sending him a letter telling him to report for work at the next shift. (Tr. 754). Goodreau, he contends, never responded to the recall letter. However, when asked if he had been recalled, Goodreau answered, "Not that I know of." He claimed to have no knowledge of being left a message on his phone answering machine notifying him of the recall, or receiving any letter to that effect. Yet, he admitted knowing that his name was on a list of people that had been recalled, and that, while he did not return to work, he was free to do so at any time. (Tr. 346; 358). Goodreau further admitted knowing before the recalls began that the Respondent was going to begin recalling skilled employees back to work. He did not, however, recall how he learned of the recall, when it was to begin, or who precisely was to be asked to return to work. (Tr. 375). I believe Pinion, and find that he indeed called and left a message for Goodreau on the latter's answering machine instructing him to return to work, and that he followed up this

[8] See, R. Exh. 8, a production chart prepared by the Respondent reflecting its monthly production figures by tonnage for 2005.

phone call with a letter to Goodreau, as was done with the other employees who received recall notices. In all, approximately 30 employees were recalled to work, but only 14 of whom agreed to return. (Tr. 838). All recalled employees worked under the same terms and conditions of employment contained in the parties' expired agreement.

In addition to Goodreau, testimony was adduced from several other employees regarding their recall notification. Employee Jason Porter was told by Rincher to report for work on June 1. When he asked if all the locked out employees were being recalled, Rincher told him only a "select few" were being recalled. Tony Duty received a call on May 28, asking him to report for work on June 1, and likewise asked Rincher if everyone else was being recalled. When Rincher answered only some employees were being recalled, he remarked, "You people can't be serious," and hung up. David Yerex received a letter on June 2, advising him to report for work on May 31. Yerex phoned Rincher that same day to obtain clarification, and was told to report for work that day, June 2, instead of the May 31 date shown on the letter. Although he told Rincher he would be at work, Yerex did not report, explaining that he felt that since all employees were locked out at the same time, they should all return to work at the same time. (Tr. 486).

Ron Jafolla testified Rincher left him a message on his home answering machine on or around May 28, and also received a letter the same day, asking him to report for work on June 1, and that he called Rincher back and told him he would be there. Wilson received a call from Rincher on his cell phone while walking the picket line on June 2, and told to report for work the following Monday. Wilson did not respond and simply hung up. He also received a letter on or about June 8, directing him to report for work.

Regarding Jafolla's recall, the latter testified that on June 1, he and employees Hiep Van Huynh and Yefim Gorivodsky, both of whom were also recalled, went to the facility with their recall notices in hand and met with Rincher in his office. Ruit was also present at this meeting, and was later joined by Pinion. Jafolla recalls starting the conversation by stating that "it was good to hear" that Rincher was calling everybody back, and Rincher answering, "We're not calling everybody back," that the Company did not want the crane operators or the hi-lo drivers back. Rincher, he contends, further commented that the Union was lying to employees and that it was the Union that kept rescheduling and canceling the meetings. Pinion, according to Jafolla, added that he was sick of being bad mouthed by Hayosh, that Hayosh was a liar and was the reason why the parties did not yet have a contract. Pinion, he contends, went on to say that he did not care if employees stood outside picketing until Christmas or whenever, that he would be willing to rent an auditorium for all to watch the negotiations take place to prove he was not the one stalling the negotiations. At one point during the meeting, Jafolla told Rincher that he was being treated for stress and could not work, and provided a doctor's note to that effect. He recalls telling Rincher that while he was unable to work due to illness, he did not want anyone taking his job. Jafolla then handed Rincher his recall notice and left. Jafolla did not return to work.[9] (Tr. 522).

Rincher had a different recollection of his June meeting with Jafolla. He recalls Jafolla, accompanied by Huynh and Gorivodsky, came to see him on June 1, and that Ruit and Pinion were also present at this meeting.[10] He recalls Jafolla providing him with a doctor's note explaining his medical condition. Rincher also recalled Huynh being upset and complaining about the lack of information being provided regarding events at the facility, and asked if the Respondent had been postponing bargaining sessions, stating that Hayosh had made such a statement and had blamed Pinion for the cancellations and for everything that was going wrong. Pinion apparently became upset on hearing this. Rincher assured Huynh that the Company had not been canceling any meetings. He denied, however, that either he or Pinion told Jafolla or any of the other employees at the meeting that the Company did not want the crane operators or the hi-lo drivers back, but admits that had such a question been asked he, in all likelihood would have responded "No" because the Respondent at the time had no plans to call them back. (Tr. 767–768).

Other employees were apparently recalled in June and July. Wilson, for example, received a call from Rincher either on June 2 or 3, asking him to report for work to his position of "roto mag tester," and a letter a few days later, with the same instructions. Employee Kenneth Lewis (K. Lewis) received a call from Rincher on July 2, asking when he might be able to return to work. K. Lewis asked if he would be returning as coil-end operator, the position he held before the lockout, and Rincher said no, that K. Lewis would be working as a schumag operator. K. Lewis had apparently held the position of Schumag operator for a couple of years some 6 years earlier. He then asked Rincher about other employees in the schumag operator classification who possessed greater seniority, and Rincher purportedly answered that said employees had not been

[9] Jafolla's explanation for why he did not return to work after being recalled was ambiguous and contradictory. He initially testified that he did not go back because he was under doctor's orders not to return to work due to stress-related problems. He then changed his story by asserting that he did not return to work because of alleged threats made by the Respondent. Yet further on in his testimony, he claimed that he did not return to work because he did not want to cross the Union's picket line. Finally, Jafolla retracted his prior explanations, stating, "I take that back," and insisted that it was his disability, and no other reason, that kept him from returning to work.

[10] Although both Jafolla and Rincher testified that Pinion was at the meeting, Pinion claimed he was not in attendance. (Tr. 852–853). He did recall speaking with Huynh in early June as he (Pinion) was walking past Rincher's office, and that Huynh asked him why he was canceling the bargaining sessions, that Hayosh said he had done so and had accused Pinion of being a liar. Pinion denied canceling any bargaining sessions and objected to being called a liar. Given Jafolla's and Rincher's agreement that Pinion was in attendance at the June meeting, I am inclined to believe that Pinion was mistaken as to where his conversation with Huynh took place, and that his conversation with Huynh occurred at the meeting testified to by Jafolla and Rincher. Pinion made no mention of, nor in fact was he asked about, the comment attributed to Rincher by Jafolla about the Respondent not wanting to recall the crane operators or the hi-lo drivers.

recalled, and that he (Rincher) needed someone to operate the "4D" schumag machine, which processes more tonnage than any of the other machines.[11] Rincher told K. Lewis that he could report for work on July 11. K. Lewis, however, told Rincher that a union meeting was scheduled for July 11, that he wanted to attend that meeting, and agreed to return to work on July 12, instead. Rincher agreed and K. Lewis reported for work on July 12, as a schumag operator. (Tr. 584–585).

Regarding the recall, Hayosh testified that he first heard of it from committee member Wilson, who reported receiving word from employees that they were being recalled. He contends that the Respondent gave no such prior notice to the Union before it began recalling locked out employees. Wilson testified to receiving several calls from employees advising that they had been asked to return to work and what they should do about it. He claims he in turn notified Wilson of the employee phone calls, and that the Union thereafter scheduled a meeting with employees to decide to what do. According to Wilson, during prior layoffs, the Respondent has notified the Union, usually through a committee member, of its intent to have a recall of laid off employees. As to whether the Respondent gave prior notice of the recall during the 2000 lockout, Wilson was vague in his answer, testifying only that he and other employees were instructed by the Union's then chief steward, identified only as "Perry," to report for work. Wilson admits that he had no personal knowledge of how the Union learned of the recall during the 2000 lockout. (Tr. 212). Under Article 8, Section 7 of the parties' expired collective-bargaining agreement the Respondent was required to "notify the Bargaining Committee of all employees hired, to be laid off, or recalled to work." (GC Exh. 6).

At a June 1 bargaining session, the Respondent notified the Union that it was recalling the schumag, wean, and maintenance employees, and, using a seniority list, identified which employees had been recalled. The Respondent did not identify which, if any, employees it intended to recall in the near future. Hayosh met with unit employees the following day to discuss the recall and testified that those employees who were asked to return to work requested that a letter be sent to the Respondent explaining that "until the unfair treatment or the threats and hostility had stopped, they weren't going to report back to work." On June 2, Hayosh prepared and the employees signed such a letter which was faxed to Goodman (Tr. 51; GC Exh. 11). Hayosh's letter does not describe, identify, or spell out what the nature of the "unfair treatment," "threats," or "hostile" activity was that prompted the decision by the employees not to return to work.

In response to Hayosh's June 2 letter to Goodman, Gunsberg sent Hayosh a letter, dated June 3, setting forth his recollection of what transpired during their June 1 meeting, a list of the employees who had been recalled for work, and a description of the recall procedure that had been used. (See, GC Exh. 12). In his letter, Gunsberg denied the claim in Hayosh's June 2 letter that the Company had unlawfully threatened employees or was trying to "bust" the Union. He further averred that the Company had been bargaining fairly, honestly, and in good faith, but that the Union apparently disagrees with "most of the company's economic and non-economic proposals." Gunsberg went on to note that those recalled employees who declined to return to work were doing so based on their disagreement "over terms and conditions of a new collective bargaining agreement." He explained that employees "who engage in a strike to enforce bargaining demands in negotiations over a new collective bargaining agreement are considered 'economic' strikers" by the Board and "may be permanently replaced." He further explained that an employer may lawfully refuse to reinstate a striker who has been permanently replaced by the time the strike is ended, and that the Company believes it has the right to permanently replace economic strikers. Gunsberg closed the letter by requesting that the listed employees who received recall notices return to work immediately.

The parties met on several occasions between May 24 and August 9. At the May 24, meeting, the Union submitted a proposal (the fourth modified proposal) to the Respondent for consideration (GC Exh. 29), and at the June 1, meeting, submitted a fifth modified proposal (GC Exh. 31). In these proposals the Union purportedly withdrew, reduced, or modified certain of its prior proposals in an effort to achieve agreement with the Respondent. At the June 1 meeting, the Union proffered a sixth modified proposal (GC Exh. 30) which included reductions in shift premium pay, production bonuses, and COLA increases. On July 5, Gunsberg met with UAW official, John Uram, and received a settlement package from Uram that encompassed all of the Union's prior proposals (GC Exh. 32). The Respondent made no counter proposals and continued to adhere to its April 28 final proposal as the basis for any agreement. While acknowledging that the Union made some concessions in its various proposals, the Respondent viewed them as nothing more than "slight adjustments . . . regarding several peripheral issues," and that "no real progress was made" during these negotiations and in the various union proposals "regarding the significant issues keeping the parties from reaching agreement." For example, while Uram, on behalf of the Union, was willing to discuss the issue of the no-strike clause, he was unwilling to remove the exceptions to the clause, as sought by the Respondent. (Tr. 997; R. Br. 13). Further, although the Respondent had sought to eliminate mandatory overtime when the seniority list fell below employees, the Union's willingness to reduce the number from 70 to 50 fell short of the Respondent's goal. Gunsberg recalled telling Uram at the end of their meeting that the "nickel and dimeing" of the proposals made by the Union did not solve any of the outstanding issues, and that when he (Uram) was ready to address them, to call him. The Respondent's April 28 final offer was still on the table at that time and, had it been accepted by the Union, the lockout would have ended. (Tr. 901)

At some point between the start of the lockout and August 9, the Respondent realized through its recruiting efforts that it could hire as many individuals at $14.50/hour as it needed as

[11] K. Lewis identified two other locked employees. Michael Barth and Michael McElheran, as schumag operators who were not recalled, but acknowledged on cross-examination that, unlike him, neither of these two individuals had any experience operating the "4D" schumag machine. (Tr. 594).

support staff and train them in a relatively short period of time, e.g., from 1 day to a week. It further realized from its inability to recruit temporary replacements for its skilled employees that its skilled employees needed to be paid at a higher rate than that proposed in its April 28 final contract proposal. With the temporary employees hired during the lockout and the 14 skilled employees that returned to work pursuant to its recall, the Respondent, over a period of time according to Gunsberg, was able to return production to near normal levels. In light of these changed circumstances which allowed it to function at near normal levels despite the lockout, the Respondent decided to give the Union a new proposal, termed the "new paradigm" proposal, reflecting what it claims were the "new realities of the marketplace." (R. Br. 15).

On August 9, the parties met at the Respondent's request at which time the Respondent presented the "new paradigm" proposal to the Union.[12] The "new paradigm" proposal did not alter any agreements reached by the parties prior to April 28. It did, however, alter the wage scale proposed for the unskilled and skilled employees in the April 28 proposal. Under the August 9 proposal, the Respondent combined several skilled job classifications with the nonskilled positions under a general support staff classification, lowered the wage rate for employees in this new classification to $14.50/hr, which is the rate at which it had been able to hire the temporary replacement employees during the lockout, and increased the pay for its skilled employees. (see, GC Exh. 27).

The parties disagree as to what occurred or was said at this meeting regarding the proposals. Gunsberg testified that after presenting the proposal to the Union, he spent some 15 minutes explaining, section-by-section, the differences between the "new paradigm" and the Company's April 28 proposals, and that he made clear to the Union that this was not a "final" proposal. Pinion likewise recalled Gunsberg discussing with the Union the new changes in the proposal. (Tr. 872; 962). According to Gunsberg, when he asked the Union to discuss the proposal, McKnight told Gunsberg, "Shame on you."

Hayosh and Wilson, however, claim that Gunsberg declined to discuss or explain the new proposal to them despite their request that he do so. Hayosh recalled that after presenting the Union with the proposal, Gunsberg stated, "This is the new paradigm, the new way we're going to operate our plant," and that when he asked Gunsberg to explain it, the latter replied, "It is what it is. You can look over it yourself." Wilson likewise recalled that Gunsberg simply slid the proposal across the table, explaining that it was the new direction that the Company wanted to go, a new "paradigm", and that, when Uram asked Gunsberg to explain the proposal, Gunsberg declined to do so and instructed him to read it. Hayosh initially claimed that Gunsberg never remarked that the new paradigm proposal was not a final proposal. However, he subsequently admitted being told this at the August 9 meeting when confronted with his own bargaining notes reflecting that Gunsberg did convey that fact to the Union. (Tr. 130–131). I credit Gunsberg and Pinion over Hayosh and Wilson and find that Gunsberg did discuss and go over with the union representatives the specifics of the Respondent's August 9 "new paradigm" proposal. I also credit Gunsberg and Pinion and find that the proposal was never described or referred to as the Respondent's final proposal. As noted elsewhere in this decision, neither Hayosh nor Wilson were particularly credible witnesses regarding other matters. As evident from his bargaining notes, Hayosh, as noted, was not being candid in asserting in his testimony that Gunsberg did not state that the new paradigm proposal was not a final proposal. (Tr. 132; 161; 163)

The parties met three more times in 2005, e.g., on September 26, October 18, and November 11. At the September 26 meeting, the Union presented a proposal reiterating that its July 5 settlement proposal was still on the table, offered to provide the Respondent with a written no-strike pledge in exchange for an end to the lockout, and proposed that all outstanding issues be submitted to "binding mediation or arbitration." (GC Exh. 33). The Respondent rejected the proposal and, according to Gunsberg, sought unsuccessfully to bargain with the Union over the August 9 "new paradigm" proposal. Gunsberg claims that when the Union, at this September 26, and subsequent meetings, began submitting proposals based on the Respondent's April 28 final proposal, he notified the Union that the April 28 proposal was no longer on the table, that it was gone, and that they should be discussing and bargaining over the August 9 proposal.

At the October 18 meeting, the Union resubmitted its September 26 proposal along with proposals which moved it closer to the Respondent's position on other issues. (See, GC Exh. 34). Gunsberg testified that the Union's October 18 proposal was again based the Respondent's April 28 proposal, and that he, consequently, told Hayosh at the meeting that the Union "was in the wrong proposal, that's not here," and that they should be talking about the August 9 proposal. (Tr. 967). The parties followed a similar script at their November 11 meeting, with the Union submitting a proposal that largely incorporated and slightly modified past proposals. (See GC Exh. 35). According to Gunsberg, his response was the same, to wit, that the Union was in the "wrong proposal."

On January 18, 2006, the Union sent the Respondent another proposal agreeing to accept the Company's pre-lockout April 28 final proposal. (GC Exh. 15). By letter to Uram and Hayosh dated January 20, 2006, Gunsberg responded that he was "somewhat mystified" by the proposal because "the Company's April 28, 2005 final proposal was withdrawn and replaced by the Company's August 9, 2005 final proposal," and that, because the April 28, offer was no longer on the table, the Union's proposal to accept it is rejected and/or denied. He went on to advise the Union that the Company was "available to bargain for a new agreement at anytime and the current lockout would be terminated upon acceptance of the Company's August 9, 2005 proposal, or an agreement reached by the parties on a variation thereof." (GC Exh. 37). The lockout was still in effect at the time of the hearing.

The General Counsel and the Charging Party argue that the lockout of employees on May 1, was motivated by antiunion

[12] Uram was also present at this meeting, as well as Union Attorney Sam McKnight.

considerations and not for legitimate economic reasons, rendering it unlawful under Section 8(a)(3) and (1) of the Act. In support of thereof, they point to various threats, comments, and actions directed by Respondent's supervisors towards employees which they claim serve as evidence of Respondent's anti-union animus and reflects the true motivation for the lockout. Alternatively, it argues that even if found to be lawful when implemented, the lockout was rendered unlawful when the Respondent, on August 9, presented the Union with a regressive, bad faith proposal. (GC Br. 35).[13]

2. Alleged unlawful and other improper statements

a. By Pinion

The first incident cited by the General Counsel dates back to an alleged 2003 conversation Pinion purportedly had with Wilson. According to Wilson, in late summer 2003, Pinion approached him at the Bay 3 work station, told him there was an important contract coming up in 2005, and what he, Wilson, thought might happen. Wilson responded that the Respondent had a good bunch of guys working there, that he did not see any problems, and that life would go on. However, Pinion, he contends, stated that he was dissatisfied with the work force and that he would like to just clean house, get rid of everybody, and start over. (Tr. 184). Pinion purportedly went on to say that the employees were older and set in their ways and that because of this, he wanted to "clean shop" so he could run the shop the way he wanted. Pinion, according to Wilson, added that he had tried to get rid of everyone during the 2000 lockout but was stopped by Respondent's owner. Pinion ended the conversation by telling Wilson that he would never admit to having this conversation with him[14] (Tr. 184–189; 294).

Pinion denied having any such conversation with Wilson. (Tr. 799–800). I credit his denial. I found Pinion to be a particularly credible witness. His demeanor was sincere, and I am convinced he testified honestly and truthfully regarding this and other matters. As to this alleged conversation, I find it improbable that Pinion, a management official, would have come right out and threatened Wilson, a union representative, with the discharge of unit employees. I find, instead, that this conversation is nothing more than a fabrication by Wilson and that it never occurred.

Pinion is also alleged to have threatened to discharge employees if they went on strike during a December 2004 conversation he and Rincher were having with union steward Goodreau in Rincher's office. Goodreau testified that about 1 week before Christmas 2004, he went to Rincher's office to discuss an absentee write-up that was issued to another employee, Otto. He recalls that Pinion, who was present, mentioned that the contract talks were coming up and asked Goodreau his view on what it would be like. Goodreau answered he did not know, that it depended on management, and that if the Respondent wanted it to be hard, it would be hard, if it wanted the negotiations to be easy, they would be easy, but that the Union was not looking for much. Pinion purportedly replied that he did not believe the Union had the support necessary for a strike. Goodreau claims he became irate and told Pinion that he did not know who Pinion was talking to but that he (Goodreau) was having a hard time keeping employees in the plant because of the poor treatment employees were receiving from Respondent. Goodreau admits that he was not being truthful in his assertion about employees being treated poorly, and made up the statement only because he had to say something. He contends that Pinion became upset at that point, slammed his fist on Rincher's desk, and threatened that employees would never again see the inside of the shop if they went out on strike. (Tr. 339–340).

Pinion denied discussing the upcoming contract negotiations in December 2004, with any employees, or telling any employee, including Goodreau, that they would not be allowed into the shop again if they went out on strike. (Tr. 801–802). Rincher denied being at a meeting with Goodreau in late December 2004 during which the subject of the upcoming contract talks was discussed, or where Pinion questioned Goodreau about the support the union might have for a strike. Nor did he ever hear Pinion tell Goodreau during any such meeting that employees would not see the inside of the plant again if they went on strike. (Tr. 747–748).

I credit Pinion's denial and find that he did not make the comments attributed to him by Goodreau. Rincher, who according to Goodreau was present and would have overheard any such remarks by Pinion, expressly denied Goodreau's account. Pinion, as noted, was a generally credible witness and his calm and soft-spoken demeanor on the witness stand is inconsistent with someone who, as described by Goodreau, would have slammed his fist on the desk in a fit of anger or rage. Conversely, Goodreau was not very convincing.

Pinion is also alleged to have made a statement to Supervisor Perry Sanford, which the latter purportedly conveyed to locked out employee Richard Sihler at a June 28 funeral service for Sihler's wife who passed away earlier that month. Sihler testified that he spoke with Sanford at the funeral and asked him if Pinion was going to bring any blast, coil end, or crane operators back. Sanford, he contends, answered that Pinion said "he ain't bringing no fucking blast operators or crane operators or coil end operators back, and we were low-life people and we're never coming back." (Tr. 636). Sihler claims that he did not respond to Sanford's comment and the conversation ended at that point.

Sanford testified he has known Sihler for some 20 years, and that when he learned Sihler's wife had passed away, he and other supervisors took up a collection for Sihler, and that on June 28, he took the money and a condolence card he purchased and took it to give to Sihler at the funeral. He recalled that after giving Sihler the card and

[13] The positions taken and arguments made by the Charging Party on brief parallel those made by General Counsel in her brief and, consequently, while duly considered, will not be separately discussed here.

[14] These alleged 2003 statements by Pinion to Wilson are not alleged to be unlawful.

money, he and Sihler chatted for a few minutes about family and related matters, and that he then left. Sanford denied ever making the remarks attributed to him by Sihler about what Sanford may have said regarding the recall of coil end operators or crane operators, and denied that Pinion ever made such a statement to him, or that he would have ever used such language at a funeral.

I credit Sanford over Sihler. Sanford, who voluntarily went to pay his respects to Sihler over the death of his wife, did not strike me as someone who would have been so insensitive and callous as to have used such offensive language at the Sihler funeral. Accordingly, I find that Sanford made no such remarks to Sihler during his funeral visit.

b. By Giacherio

Machine Operator David Yerex testified to having a conversation with his immediate supervisor, Giacherio, in late April regarding the Respondent's contract proposal. According to Yerex, several days before April 28,[15] the day the Union was first presented with the Respondent's final proposal, he found a copy of the proposal on a table next to the time clock as he was on his way to lunch. As he was reading it, he commented, presumably aloud, that he could not agree to its terms, to which Giacherio replied, "If you don't take this proposal, you won't be coming back." (Tr. 480). Yerex was vague and confusing regarding where and when this conversation took place. On direct examination, Yerex stated that this conversation occurred during his lunch period which he described as occurring from 3–3:30 a.m., and that he was eating lunch "directly" before this conversation with Giacherio occurred. He contends that Giacherio proceeded to repeat his statement, although it is unclear what, if anything, Yerex may have said in response to Giacherio's alleged first statement, or what may have prompted Giacherio to repeat his statement. On cross-examination, Yerex claimed that his conversation occurred as he was heading back to his work station following lunch, not, as suggested on direct examination, as he was eating lunch, and that Giacherio approached him as he was walking out of the cafeteria. He contends that Giacherio walked back with him to his machine and they engaged in a 5–10 minute conversation about the proposal.

Giacherio testified he was unaware that a lockout was to take place prior to its implementation. He recalls speaking with Yerex sometime before the lockout about the Respondent's contract proposal and being asked by Yerex what would happen if the Union did not accept it. According to Giacherio, he responded to Yerex's query by asking the latter what he thought would happen. Yerex purportedly answered that if there was no contract, "nobody would be there." Giacherio explained that he had no idea what would happen and that hopefully there would not be a strike. (Tr. 674). Giacherio denied telling Yerex or any other employee that if he and the Union did not accept the Company's proposal, they would not be returning to work or would lose their jobs (Tr. 656).

I accept Giacherio's version as true. Yerex was vague and unconvincing regarding this alleged exchange with Giacherio. For example, despite claiming to have gotten and read the proposal a week or "a couple of days" before April 28, when advised on cross-examination that the proposal was first given to the Union on April 28, and asked how he could have had a copy of the proposal beforehand, Yerex fumbled for an answer, stating, "I read it at the end of May, or at the end of April. I guess it was on the 28th, then." His vague and uncertain testimony in this regard, coupled with other inconsistencies in his account, lead me to doubt its reliability. Accordingly, Giacherio's account of this encounter is credited.

c. By Rincher

Jafolla testified to several conversations he had with Rincher when first hired in March 2004, several months later in August or September 2004, and on June 1, and July 18, 2005. As to the 2004 conversations, Jafolla contends that during his initial hiring interview in March 2004, Rincher said to him, "Don't ever cross me. I'm a vindictive motherfucker." He contends that several months later, in August or September 2004, he and Rincher were discussing the discharge of employee Goodreau. When he asked Rincher, "You finally got him?" Rincher answered, "Yeah, remember what I told you in the interview." Rincher recalled interviewing Jafolla, but denied making the statement attributed to him by Jafolla during that interview, or ever discussing Goodreau's discharge with Jafolla or saying that he had gotten Goodreau. (Tr. 763–764)[16]

The June 1 conversation was previously discussed, and occurred when Jafolla returned to work, accompanied by fellow employees Huynh and Gorivodsky, and met with Rincher. Jafolla contends that Rincher, in response to Jafolla's remark about being glad that Rincher was calling back all the employees, commented that not everyone was being recalled, and that the Company did not want the crane operators or hi-lo drivers back. Rincher, as noted, denies making any such statement.

The July 18 conversation, which both Rincher and Jafolla agree occurred, took place in the parking lot of a health facility, the Powerhouse Gym. Jafolla contends that as he and his workout partner were leaving, he heard Rincher, who was nearby, calling him. When he went over to Rincher, the latter asked him what he was doing. Jafolla inquired as to what Rincher was referring to, and Rincher asked why he had not returned to work, that he, Jafolla, was going to lose his job. Jafolla purportedly replied, that he just couldn't bring himself to cross the picket line, to which Rincher allegedly replied, "You're all going to lose your jobs." Rincher, he contends, added that the doors wouldn't be open much longer, and that everyone who received phone messages and been recalled would, like the

[15] He could not be certain if it was a week or "a couple of days."

[16] Neither of the 2004 statements attributed to Rincher by Jafolla is alleged to be unlawful.

hi-lo drivers and crane operators, lose their jobs. Rincher went on to say that his only concern was his family, and that "we don't need a union around here." Jafolla contends that Rincher also made reference to the Respondent's proposal, saying that if "we didn't like the first proposal, wait until you see the second one. It's going to get worse." At the end of the conversation, which Jafolla estimates lasted some 5–10 minutes, Rincher told him that if he told anyone about their conversation, he would flatly deny it. (Tr. 526).

Rincher provided a much different account of the July 18 conversation. He recalled that as he was getting out of his car in the parking lot, he saw Jafolla with his friend, and called out to Jafolla, "What's up?" Jafolla then left his friend and came over to Rincher. When Rincher asked how he was doing, Jafolla replied that he was doing all right but was "really stressed out" and didn't know what to believe, and felt that the Union was "fucking him." He went on to say that "he was not getting straight answers from anybody, and that he and his wife were having some issues because he won't come back to work." Jafolla then asked Rincher if he could return to work, and was told he could return anytime he wanted. When Jafolla asked how long he had, Rincher said, "I don't know how long, the door is open for you right now. Just come back." Rincher denied saying to Jafolla that a union was not needed, or that if the union did not like the Company's first contract proposal, wait till it sees the second one. (Tr. 771–772).

I credit Rincher over Jafolla. Jafolla was not a credible witness. Jafolla, for example, contradicted himself in explaining why he did not return to work after being recalled (see fn. 9, supra). His changing testimony as to why he did not return to work, and his overall poor demeanor on the witness stand, leads me to reject his version of the conversations he purportedly had with Rincher. Thus, I find that Rincher never told Jafolla on June 1, that the Company did not want the crane operators or hi-lo drivers back, or stated, during their July 18 encounter at the Powerhouse gym, that those employees who were recalled but did not return to work would be losing their jobs.

Another statement attributed to Rincher allegedly occurred in January 2005, soon after employee and Schumag Operator Jason Porter submitted a vacation slip requesting time off for the first week in May. Porter contends that after turning in his vacation slip, he asked Rincher if the request would be approved, and Rincher purportedly answered, "You don't need a vacation. You'll already be out that week anyways." Porter claims that Rincher was laughing and joking around when he purportedly made his remark. The lockout, as noted, went into effect May 1. Porter claims that when he asked Rincher for an explanation, Rincher just walked out without answering.

Rincher recalled having a brief discussion with Porter in January 2005, at his machine, regarding the latter's vacation. His recollection is that Porter asked if his vacation request was going to be approved and Rincher, unaware or having forgotten about the request, told Porter to submit his request and it would be put through the proper channels. After returning to his office, Rincher found Porter's request, checked to see if anyone else had requested vacation for the week in question, and then approved and returned the approved request to Porter. He denies telling Porter that he did not need to take vacation because he would not be working that week anyway, and testified that Porter did in fact receive his vacation. (Tr. 762).

I credit Rincher over Porter. Although polite and soft-spoken on the witness stand, Porter nevertheless seemed unsure and insecure in answering questions put to him. From a demeanor standpoint, Rincher came across as the more reliable and credible of the two. Accordingly, I accept Rincher's testimony over Porter's regarding the discussion they had about Porter's May vacation.

d. By Morley

Porter further testified that on April 29, before employees voted on the Respondent's proposal, Morley approached him at his machine and, out of the blue, asked if Porter could keep a secret. When Porter asked what type of secret, Morley purportedly told him, "You will be back." Porter asked if he Morley was referring to the new contract, and Morley allegedly replied, "Well, not under the type of contract you're under now but it's a type of a contract." Porter then asked if everybody was coming back, but Morley did not elaborate further. Morley, he contends, went on to comment that he was concerned about discussing this before the employee vote on the Company's proposal, and went on to remark how impressed he had been with the Company's new layout for the facility. Porter asked Morley what it was that impressed him, and Morley guardedly quipped, "Well, I said too much." When Porter asked him to explain what he meant, Morley replied, "Well, if you mention my name, I will deny it," referring to his prior comments. As he walked away, Morley allegedly remarked that if his comments changed Porter's upcoming vote regarding the Respondent's proposal, "so be it." (Tr. 442).

Morley denied having any such conversation with Porter, or making the comments attributed to him by Porter. He also denied knowing of any new layout plan for the facility, or seeing any plan. Morley recalls speaking twice with Porter over the phone after the lockout, one of which involved a request by Porter to use Morley as a job reference. He was not asked about the substance of the second phone conversation with Porter. (Tr. 681–683; 696).

Crane Operator Mike Campeau also gave testimony regarding statements allegedly made to him by Morley. According to Campeau, in early April, some 3 weeks before the employee vote on the Company's proposal, and as he was in his work area, Morley walked by him with a funny look on his face and remarked, "You know, boy, I'm really going to miss you, Mike." Campeau simply looked at Morley but did not respond, and Morley continued on his way. Morley denied making such a statement to Campeau. (Tr. 598; 683).

The statements attributed to Morley by Porter and Campeau are not alleged in the complaint to be unlawful. Nev-

ertheless, I credit Morley and find that he never made such statements to them. From a demeanor standpoint, Morley was a convincing and credible witness, while Porter and Campeau were not. Their assertions that Morley made the alleged statements to them out of the blue simply lacks the ring of truth. Porter's assertion that he followed Morley's "You'll be back" statement with an inquiry about the new contract makes little sense to me. Further, Morley's alleged statement to Campeau, to wit, that Morley was going to "miss" Campeau, even if found to have been made, is vague and subject to any number of meanings. Accordingly, I find that Morley never made the statements attributed to him by Porter and Campeau.

e. By Sanford

Tom Jewell is employed as a coil end operator with the Respondent. Sometime in February, Jewel was suspended, apparently for intentionally damaging the bar blast machine on which he was working. Regarding this matter, both Wilson and Goodreau testified that they, along with Jewell, were summoned to Rincher's office and met with Sanford who advised them that Jewell was being suspended for 3 days for intentionally damaging a machine. (Tr. 181–182; 333–334). After some discussion, Wilson proposed that, instead of suspending Jewell, he be assigned to a nonproduction area. Sanford, he contends, indicated he did not have a problem with the suggestion but would have to consult with his superiors. Some 10 or 15 minutes later, Sanford returned from discussing the matter with Pinion and, according to both Wilson and Rincher, remarked, "write your fucking grievance, he's going home."

Goodreau claims that, later that same day, he spoke with several millwrights who told him that the machine Jewell was accused of damaging "was worn out and needed to be replaced anyway, "the parts were taken away the night before." He contends that he and Wilson then went back to Rincher's office shortly before 3 p.m., in an effort to change Respondent's decision about Jewell's suspension, and spoke to Pinion. He purportedly told Pinion what he had learned from the millwrights, stating that he could obtain written statements from the millwrights to that effect. Wilson claims Pinion told them that if they did that, "You know what will happen." Wilson contends that Pinion subsequently explained his remark by commenting that he would fire any millwright who signed a letter saying that Jewell was not to blame for the damage to the machine. Goodreau's version is that Pinion remarked that if he obtained statements from millwrights, he (Pinion) would fire every one of the SOB's because he had a preventative maintenance sheet showing that the machine in question had been checked out the month before and was working fine. He contends that Rincher was also present during this conversation and that Wilson showed up a bit later and caught the tail end of the discussion. Goodreau claims that he then asked Pinion to return to him a grievance he had submitted on Jewell's behalf, explaining that he had forgotten to include additional matters in the grievance. Pinion purportedly told him that if he filed the grievance, he (Goodreau) knew what was going to happen and that Goodreau would not like it. (Tr. 335–338). Although Pinion did not explain what he meant by his remark, Goodreau claims he understood what Pinion meant.

Goodreau testified that the next day, he observed Sanford talking to various millwrights in the shop, and, on one occasion, noticed Sanford engaged in a heated argument with employee Paul Nowicki. He contends that at one point, Nowicki threw down his gloves, approached him and complained, "This SOB just told me Ken Pinion is going to fire me if I give you a statement." After calming down Nowicki, Goodreau tried to get statements from the millwrights who had offered to provide them to him in connection with Jewell's grievance but the millwrights declined to do so, explaining that they needed their jobs and offering other excuses. Believing that he really did not need their statements to prevail on the grievance, Goodreau dropped his efforts to obtain the employee statements. (Tr. 334–339).

Nowicki recalled speaking with Goodreau about the Respondent's claim that Jewell had damaged a machine. He claims he told Goodreau that the sandblasting machine Jewell allegedly damaged was by its nature, self-destructing and constantly needed rebuilding. Nowicki purportedly agreed to, but never did, provide Goodreau with a written statement to that effect. He contends that about a week or two after Jewell was suspended, he had what he described as a "low-keyed" conversation with Sanford over the Jewell matter, and that Sanford told him at the time that if he or any other employee took Jewell's side they would be in trouble. (Tr. 315). Sanford purportedly went on to say that it was not in Nowicki's best interest to provide a written statement to Goodreau. On further examination, Nowicki admitted he could not recall or be sure if Sanford made reference to a written statement. However, on direct examination by Charging Party counsel, Nowicki, somewhat inconsistently, testified that Sanford told him it would not be in his or any millwright's best interest to say or write anything against the Company on behalf of Tom Jewell. Nowicki claims he never got to give a written statement on Jewell's behalf because by the time he was ready to do so, Jewell had been reinstated. Nowicki concluded that he just "blew the whole thing off," explaining again that the whole conversation was pretty low-key.

Sanford, who supervised Jewell, gave the following account of the Jewell incident and of his conversation with union representatives regarding the matter. Jewel, he contends, was disciplined for damaging a blast machine, and was suspended pending an investigation. He recalls meeting with Wilson, and possibly Goodreau, to discuss the matter, and claims that, during the meeting, Rincher offered to transfer Jewell to another work area of the facility known as "the Hole." (Tr. 727). Jewell, however, purportedly rejected the offer and was then sent home. A grievance was thereafter filed on Jewell's behalf. Sanford denies ever telling Jewell to go ahead and file his "fucking"

grievance before sending him home, or telling any employee not to file statements on Jewell's behalf or in support of his grievance, or that it would not be in their best interest to do so. He also denied threatening employees with discharge if they supported Jewell's grievance or if they gave statements in support thereof.

Sanford recalls having a casual conversation with Nowicki, during which he asked the latter if he knew of a rumor going around that several millwrights had signed a statement saying that the machine Jewell is alleged to have damaged had been in state of disrepair. Nowicki claimed to be unaware of any such statement. According to Sanford, Nowicki called out to another employee, Ted Rollins, who was nearby and asked if he was aware of any such statement, and Rollins answered he was not. Sanford denies telling Nowicki that it was not in his best interest to provide a written statement, or that his exchange with Nowicki was a heated one. (Tr. 729).

I credit Sanford over Goodreau and Nowicki. Inconsistencies and discrepancies in Goodreau's and Nowicki's testimony regarding the Jewel matter lead me to doubt the reliability of their accounts. Nowicki, as noted, had difficulty getting his story straight as to what Sanford may have said to him about providing a statement on the Jewel matter, stating at one point that Sanford cautioned him against providing a written statement, but then adding that he was not sure if Sanford mentioned written statements to him. At another point, Nowicki related only that Sanford told him that if he or any other millwright took Jewel's side, they would be in trouble, but made no mention of a written statement. As to Goodreau, he was, as previously discussed and found, not particularly credible and not wholly consistent with Nowicki's version of events. For example, Goodreau's claim that the conversation he observed between Sanford and Nowicki took place the day after Jewel was suspended does not square with Nowicki's claim that his conversation with Sanford about the Jewel matter occurred about a week or two after the suspension. Nor did Goodreau's description of the conversation between Sanford and Nowicki being a heated one square with Nowicki's claim that the conversation was low-keyed. Accordingly, I find that Sanford never threatened Nowicki and/or Goodreau with termination or other repercussions if they or any other employee gave statements in support of the Jewel or any other grievance.

3. The alleged discriminatory work reassignment of Lawrence Lewis (L. Lewis)

L. Lewis is a crane operator at Bay 1 on the midnight shift whose duties included unloading material and loading the blast machine. He has worked for the Respondent since 1978. During his tenure, he served as union steward for several years, was on the Union's bargaining committee during the 2000 negotiations, and was on the bargaining committee during the most recent negotiations. L. Lewis testified that during a bargaining session held on or around April 19, he complained to management about "oily floors" in Bays 2 and 4 of the facility and that additional manpower was needed to keep them clean on a regular basis. Pinion, who was present at that session, replied that he would take care of the problem.

Pinion confirmed being present at the April bargaining session, although he testified that it took place around April 12, not April 19, as claimed by L. Lewis. He recalled L. Lewis stating that the floors in Bay 4 were oily and slippery and dangerous. Pinion agreed to look into the matter and testified that, either later that same day or the next afternoon, he sent an e-mail to all "Livonia foremen" alerting them to the dangerous oily floors in the Bay 4 area. The e-mail states that given the reduced truck traffic and movement of material on the midnight shift, that shift would be the best time to conduct a clean up of the area, and that the supervisors should use employees with free ime to do the cleanup, proposing that they either rotate all employees or have all employees do the cleanup.[17]

L. Lewis testified that, on reporting for work later that evening, he was approached by his supervisor, Gulaszewski, and told that he had received an e-mail from Pinion directing him (Gulaszewski) to tell L. Lewis that if he was not unloading trucks or loading the blast machines, Pinion "wants your ass up in Bay 4 cleaning the floors." L. Lewis purportedly expressed the view that it was against the law to assign him such work because this had been discussed during the negotiations earlier that day. Gulaszewski replied that that was the way Pinion was and that Pinion would be watching him. L. Lewis explained in this regard that several months earlier, the Respondent had installed closed circuit cameras in the facility and could observe via computers what was going on at the facility. L. Lewis contends that he also asked Gulaszewski if anyone else had been assigned to clean up Bay 4 that night and that the latter replied "No, just you." The conversation pretty much ended at that point, according to L. Lewis. According to L. Lewis, on occasions that he worked overtime moving steel from Bay 2 to Bay 4, he would, if he had enough time, clean up Bay 4.

The following night, L. Lewis contends, Gulaszewski approached him and said, "I haven't seen you up in Bay 4." L. Lewis replied that he had had things to do, to which

[17] A copy of the e-mail was received into evidence as R. Exh-4. In their respective posttrial briefs, both the General Counsel and the Charging Party question its legitimacy and suggest that it is fraudulent and prepared after-the-fact for litigation purposes. At the hearing, however, neither raised any objection to its admission into evidence. The Charging Party's assertion on brief, that the e-mail should be considered suspect because the bargaining session at which the issue of the oily floor was raised did not occur until April 18, several days after the e-mail was prepared, is rejected as without merit. Its claim in this regard appears to be based on L. Lewis' assertion that the bargaining session occurred on or around April 19. However, L. Lewis' testimony in this regard is contradicted by Pinion, and by the Union's own representative, Goodreau, both of whom placed the meeting as having taken place on or around April 13. L. Lewis' claim that the bargaining session took place on or around April 19, is rejected as without merit. I find, in agreement with the mutually consistent assertions made by Pinion and Goodreau, that the bargaining session occurred on or about April 13.

Gulaszewski purportedly responded, "Just to let you know Pinion is watching us, he wants to see your ass up there cleaning in Bay 4." After loading the blast machine, L. Lewis did perform some cleanup in Bay 4. He contends that no one else was cleaning up in Bay 4, but that two other employees, Lenford Lyons and Mike Gotts, were doing cleanup work in Bay 5. L. Lewis believes he was assigned to do cleanup in Bay 4 for a third day.

Gulaszewski testified that when he arrived for work around 11 p.m. sometime in early April, he received a group e-mail from Pinion addressed to "all Livonia foremen" stating that the "shop was in need of a cleanup." The e-mail, he contends, did not identify any particular employee as being assigned to do the cleanup work. In response to the e-mail, Gulaszewski assigned L. Lewis and employee Gotts to do cleanup work. Gotts, he contends, was selected because he was an extra man in Bay 1, and had nothing to do that evening. L. Lewis, he further explained, was selected because there were no truck deliveries that night for him to unload, and the blast machine was already fully loaded, leaving L. Lewis with little to do. The following day, employees Richard Nader and Lenford Lyons were picked by Gulaszewski to do cleanup work. He contends, however, contrary to L. Lewis' assertion, that he did not assign L. Lewis to do cleanup work that evening because there was sufficient work to do unloading trucks. Gulaszewski denies being told by Pinion to put L. Lewis' "ass in Bay 4 cleaning floors," telling L. Lewis that he had been so instructed by Pinion, or telling L. Lewis that he needed to get his ass in Bay 4 cleaning floors. He also denied telling L. Lewis that Pinion was watching him. (Tr. 704–707; 713).

Supervisor Giacherio also identified R. Exh-4 as an e-mail he received from Pinion sometime during contract negotiations in April. Like Gulaszewski, Giacherio denied ever receiving an e-mail from Pinion directing him to assign L. Lewis to floor-cleaning duties.[18] Goodreau gave some contrary testimony to Giacherio's above assertion.

Goodreau claims he was present at the April bargaining session, which he contends took place on or around April 13, and heard L. Lewis complain about the oily floors in the facility and how the Company only went on a cleaning campaign when it was faced with an outside inspection, such as from OSHA. According to Goodreau, on reporting for work later that evening, Giacherio approached and asked him what L. Lewis had done to make Pinion so mad. He contends that Giacherio then showed him an e-mail he had received from Pinion directing him to have L. Lewis clean up Bay 4, a claim expressly denied by Giacherio Goodreau claims he read the e-mail and that it was addressed to "the midnight foreman" and specifically directed him to assign L. Lewis to the cleanup work in Bay 4. On cross-examination, however, Goodreau testified that the e-mail he saw directed "the foremen," not simply the "midnight foreman" as he asserted on direct examination, to have L. Lewis clean Bay 4. (Tr. 347; 354). Goodreau took no action regarding the assignment of L. Lewis to do cleanup work.

Goodreau's testimony that Giacherio showed him an e-mail from Pinion specifically directing that L. Lewis be assigned cleanup duties in Bay 4 is rejected as a pure fabrication and without merit. Giacherio, as noted, denied having done so, and no document or other witness was produced to corroborate Goodreau's testimony. Further, Goodreau's description of the contents of this alleged e-mail was anything but clear. As noted, he gave conflicting descriptions as to whom the e-mail had been addressed, e.g., stating on direct examination that it was directed to the "midnight foreman," but claiming on cross-examination that it had been addressed to all "the foremen." Goodreau, I am convinced, made up this account as a way of bolstering the government's claim that L. Lewis was discriminatorily reassigned to perform cleanup duties.

Nor do I believe L. Lewis' account of what Gulaszewski said to him on assigning him to do cleanup work in Bay 4. L. Lewis could not say for sure when this work assignment occurred, claiming it occurred on or about April 19, but then stating that it occurred on whatever date he mentioned in his affidavit to the Board. L. Lewis was also vague on when during his shift he performed such cleaning duties, or how long he spent doing the cleaning work. Nor was he clear on whether he did cleanup or some other type of work on the second night he allegedly was assigned cleanup duties. (Tr. 407). L. Lewis also seemed to be guessing on whether he actually was assigned to do cleanup work on a third night for when asked, on cross-examination, if he cleaned up a third night as he initially testified to on direct examination, L. Lewis responded, "I probably did."

I have no doubt that L. Lewis was assigned to clean up Bay 4 on the evening following the bargaining session of April 13, for Gulaszewski admitted assigning him to do such work that evening. However, as between L. Lewis and Gulaszweski, I credit the latter's account of how and why the assignment occurred. Thus, I find that following the April 13 contract talks between the parties, and the discussion therein regarding the oily floors in Bay 4, Pinion sent an e-mail to all his foremen advising of the problem and proposing that the midnight shift employees be assigned to clean up Bay 4 on a rotating basis or all together. The e-mail did not specifically designate L. Lewis

[18] The General Counsel, on brief, misrepresents Giacherio's testimony by asserting that Giacherio "testified that he may have seen another email, drafted by Pinion, that specifically mentioned L. Lewis' name in mid-April regarding cleaning oily floors." (GC Br. 13). Giacherio gave no such testimony. Rather, Giacherio's testimony was that he received numerous e-mails from Pinion during the months of March and April and could not, while on the witness stand, possibly remember all of them, a rather plausible assertion in my view. Thus, when asked by General Counsel if there was a possibility that he might have received "another email regarding Mr. Lewis in March and April 2005," Giacherio admitted it was possible. Giacherio, however, never admitted seeing another e-mail that specifically addressed the assignment of cleanup duties to L. Lewis. In fact, Giacherio expressly denied receiving any e-mail from Pinion directing him to assign L. Lewis to clean-up duties. (Tr. 675; 661).

as the individual who was to do the work. I further find that on receipt of Respondent Exhibit 4, Gulaszewski, as testified to by him and for the reasons he gave, assigned L. Lewis and Gotts to cleanup Bay 4. I further find, consistent with Gulaszewski's account, that L. Lewis was not assigned to clean up Bay on the following evening.

B. Discussion and findings

1. The 8(a)(1) allegation

a. The alleged supervisory/managerial remarks

The complaint alleges that the Respondent violated Section 8(a)(1) when Pinion allegedly told Goodreau in December 2004, that if the Union ever goes on strike, employees would never again see the inside of the shop. Having credited Pinion's denial that he made such statement, the allegation is found to be without merit.

It is further alleged that the Respondent violated Section 8(a)(1) when Pinion purportedly threatened to fire any millwright who gave a statement in support of the Jewell grievance. I have, as noted, credited Pinion and found that no such threat was made by him. Accordingly, the allegation is found to be without merit.

The complaint also alleges that the Respondent, through Giacherio, violated Section 8(a)(1) when Giacherio purportedly threatened Yerex and other employees with job loss if they did not accept the Respondent's April 28 contract proposal. As found above, no such threat was made by Giacherio. Consequently, this allegation is without merit.

It is also alleged in the complaint that the Respondent, through Rincher, violated Section 8(a)(1) when on June 1, he purportedly told Jafolla that the Company did not want to recall the crane operators and hi-lo drivers, and when, on July 18, he purportedly remarked to Jafolla during a conversation outside the Powerhouse gym that those employees who were recalled but refused to return to work would be terminated. As found above, Rincher made no such statements to Jafolla. Nor do I credit Jafolla's further assertion that Rincher also commented that the Respondent did not need a union around anymore. Accordingly, the allegations are without merit and shall be dismissed.

Another complaint allegation involves Sihler's claim that Sanford told him while attending a funeral for Sihler's wife the Company was not bringing the "fucking blast operators or crane operators back." I have, as noted, credited Sanford's assertion that he never made any such remark to Sihler. This allegation shall also be dismissed.

The Respondent is further alleged to have violated Section 8(a)(1) when Sanford purportedly threatened Nowicki and/or Goodreau with termination or other reprisal if they provided statements in support of the Jewel grievance. Having credited Sanford and found that no such threat was made, dismissal of this allegation is also warranted.

b. The videotaping of picketers

The complaint alleges, and the Respondent denies, that the videotaping of employees engaged in picket line activity following their lockout on May 1, amounted to the unlawful surveillance of employees.[19] The Board has held that, absent proper justification, it is unlawful to photograph or videotape employees engaged in Section 7 activity because such conduct has a tendency to intimidate employees and plant a fear of reprisal. *Engelhard Corp.*, 342 NLRB 46 (2004); *Town & Country Supermarkets*, 340 NLRB 1410, 1414 (2004); *Kentucky River Medical Center*, 340 NLRB 536, 553 (2003). The mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Id. The credited testimony of various employees, as found above, makes clear that the Huffman guards contracted by the Respondent during the lockout did, in fact, openly record the picketing activities of employees using video cameras. The evidence also makes clear that the picketing by employees was conducted in an orderly and peaceful manner, offering thereby no justification for the videotaping of the picketing employees' activities. In these circumstances, I find, in agreement with General Counsel, that the videotaping of the picketers amounted to an unlawful surveillance of their activity and violated Section 8(a)(1) of the Act.

c. Attorney Gunsberg's June 3 letter

The General Counsel further contends, and the Respondent denies, that Gunsberg's June 3 letter to Hayosh, stat-

[19] The complaint alleges, and the Respondent in its answer denied, that the Huffmaster security guards were its agents under Sec. 2(13) of the Act. However, neither at the trial nor in its posthearing brief did the Respondent assert the absence of an agency relationship as a defense to the surveillance allegation. Rather, the Respondent's defense is that the security guards did not videotape the picketing activity but rather focused on the guards themselves and on the traffic in and out of the facility, and that any recording of the picketing employees was incidental, occurring only if they happened to enter into the path of traffic that was being cleared. Its failure to assert the "lack of agency" defense at the hearing or in its posthearing brief leads me to believe that the Respondent is no longer denying that the Huffmaster security guards were its agents while the picketing was taking place. I am, in any event, satisfied that the security guards were serving as agents of the Respondent under Sec. 2(13) of the Act at the time in question. The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *GM Electrics*, 323 NLRB 125 (1997). In making such a determination under Sec. 2(13), "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Here, the employees who reported for work on May 1, only to learn that they had been locked out, could reasonably have believed, on seeing the Huffman security guards standing alongside Pinion and Respondent's attorney Gunsburg, and on subsequent days thereafter videotaping them as they walked the picket line, that the guards were representing the Respondent and acting on its orders and at its behest. Accordingly, I am convinced, and so find, that the Huffman security guards were indeed agents of the Respondent within the meaning of Sec. 2(13) when they videotaped employees on the picket line.

ing that employees who refused to return to work after being recalled could be permanently replaced, amounted to an unlawful threat to permanently replace locked out employees in violation of Section 8(a)(1) of the Act, citing *Harter Equipment*, 293 NLRB 647 (1989) and *U.S. Service Industries*, 319 NLRB 231 (1995). The General Counsel's contention is without merit.

While an employer may hire temporary employees during a lockout to replace the locked out employees, *Harter Equipment*, 280 NLRB 597 (1986); see also, *Bud Antle, Inc.*, 347 NLRB 479 (2006), *Bunting Bearings Corp.*, 343 NLRB No. 64 (2004), the Board, in a subsequent but related *Harter Equipment, Inc.* decision, see 293 NLRB 647 (1989), held that locked out employees may not be permanently replaced. The General Counsel contends that, given the Board's latter holding, it logically follows that "any statement made to locked out employees threatening that they can be permanently replaced must be found unlawful as well." (GC Br. 30). I need not decide whether such a statement is or is not unlawful, for when the circumstances surrounding Gunsberg's pronouncement are fully considered, it becomes readily apparent that Gunsberg was not threatening to permanently replace all of the locked out employees.

Gunsberg's statement, as noted, was made in response to Hayosh's June 2 letter advising the Respondent that those locked out employees who were being recalled had decided not to return to work to protest what they perceived to be their "unfair treatment" by the Respondent, and until the Respondent ceased its unspecified "threats and hostility." Thus, Gunsberg's statement was directed at those employees who had been recalled but who signed the Hayosh letter signaling their intent not to return to work. Having been recalled, these employees must have known that they were no longer locked out and were expected and required to report for work. By deciding to withhold their services, these employees could very well be classified as economic strikers who, as Gunsberg accurately pointed out to them in his letter, could be permanently replaced. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). Gunsberg's letter, therefore, did nothing more than advise these employees of their rights as economic strikers under *Laidlaw*, supra. An employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. See, *George L. Mee Memorial Hospital*, 348 NLRB No. 15 (2006), citing *Eagle Comtronics*, 263 NLRB 515 (1983). Gunsberg's letter did precisely that, and, while Gunsberg urged those employees who had been recalled to return to work, he did not threaten to deprive them of any rights to which they were entitled under *Laidlaw*.[20]

The General Counsel proffers yet another argument, somewhat inconsistent with her above claim that the recalled employees were not strikers, to support her claim that Gunsberg's statement constituted an unlawful threat. Thus, in her post trial brief, the General Counsel concedes that the employees did indeed authorize Hayosh to notify the Respondent that they would not be returning to work because "the Respondent was committing unfair labor practices." (GC Br. 20). This argument is equally without merit.

First, while Hayosh in his letter refers to the Respondent's alleged "unfair treatment" of employees, and to alleged "threats and hostility" made or directed by Respondent towards employees, as the reason why employees were not returning to work, he does not describe or give any indication of what the alleged "unfair treatment," "threats," or "hostility" consisted of. Hayosh's assertion, therefore, is too vague and ambiguous to support a finding that the employees who declined to return to work were engaged in an unfair labor practice strike, as claimed by the General Counsel. Nor can the General Counsel rely on the numerous unfair labor practices alleged to have been committed by the Respondent to substantiate her claim that the employees were unfair labor practice strikers, for, as discussed and found elsewhere in this decision, with the exception of the videotaping incident found to be unlawful, said allegations of misconduct by the Respondent are wholly without merit. As to the videotaping misconduct engaged in by the Respondent, I seriously doubt that this conduct played any role in the recalled employees' decision not to return to work. To reiterate, Hayosh in his letter does not identify this or any other specific acts of misconduct by the Respondent as the reason why employees chose not to return to work.

The General Counsel's claim that the employees were unfair labor practice strikers is further undermined by an article written by Goodreau for the June edition of the union newspaper in which he discussed the lockout. (See R. Exh-3) In the article, Goodreau states, inter alia, that the employees who went on strike "can be permanently replaced," implicitly acknowledging thereby that the employees were economic, and not unfair labor practice, strikers. Goodreau sought to disavow the comment by suggesting that he was only reiterating what Gunsberg had said in his June 3 letter, and by claiming not to know the difference between a locked out employee and an economic striker, or of the reinstatement rights applicable to these employee categories. Goodreau, however, never mentioned Gunsberg in the article, nor did he attribute his remark to Gunsberg. His claim that he was simply quoting Gunsberg is found to be without merit. I also do not believe that Goodreau,

[20] The General Counsel's assertion on brief (GC Br. 21), that the employees never actually declared themselves to be on strike, is somewhat disingenuous, and ignores the plain language of Hayosh's letter. Hayosh's letter makes patently clear that those employees who had been recalled, and who identified themselves in the letter, would not be returning to work, e.g., withholding their services, until certain conditions were met. The failure by Hayosh to use the magic words, "on strike" to describe the employees' decision not to return to work does not render the withholding of their services any less a strike. Indeed, the General Counsel, on brief, appears to contradict her above claim that the recalled employees were not on strike by admitting that said employees did indeed authorize Hayosh to notify the Respondent that they would not be returning to work because "the Respondent was committing unfair labor practices."

who was on the Union's bargaining committee and had served 2 years as the Union's chief steward, did not know the difference between a locked out employee, an economic striker, or an unfair labor practice striker. In sum, I reject his claim in this regard, as well as the General Counsel's claim that the employees who refused to return to work after being recalled were unfair labor practice strikers. Rather, I find that the employees who refused to return to work were economic strikers, and that their decision to remain out on strike was motivated not by any alleged unfair labor practices the Respondent may have committed, but rather to maintain solidarity with those remaining locked out employees who did not receive recall notices, presumably in the hope that their conduct would pressure the Respondent into ending the lockout and recalling the remaining locked out employees back to work. Indeed, the General Counsel in her opening remarks appears to have conceded as much when she averred that "Some [employees] decided not to return unless all employees were returned." (Tr. 17). Accordingly, for the above-stated reasons, I find that Gunsberg's statement in his June 3 letter to employees who refused to return work after being recalled, that as economic strikers they could be permanently replaced, did not violate Section 8(a)(1) of the Act.[21]

2. The 8(a)(3) and (1) allegations

a. The assignment of clean-up duties to L. Lewis

The complaint further alleges, and the Respondent denies, that the assignment of cleanup work to L. Lewis on April 13, was discriminatorily motivated and a violation of Section 8(a)(3) and (1) of the Act. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth established a causation test to be applied in cases alleging a violation of Section 8(a)(3) or (1) that turn on employer motivation. Under that test, the General Counsel must first make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to discharge or otherwise discipline an employee. The General Counsel makes out a prima facie case by showing that the affected employee had engaged in union or other protected activity, that the Respondent was aware of such activity, that it harbored antiunion animus, and that the decision taken against the employee was motivated if not wholly at least in part by said animus. Once the General Counsel makes such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

There is no disputing that L. Lewis was an open and active union supporter, and that the Respondent knew of his union involvement, for L. Lewis, as noted, was part of the Union's bargaining committee and took part in the April 13 negotiations with the Respondent's management team during which he apparently complained to the latter about the oily floors in Bay 4. On the animus question, the General Counsel claims that Pinion demonstrated its hostility towards L. Lewis by issuing an e-mail, which Goodreau claims was shown to him by Giacherio, directing that L. Lewis be assigned to clean the floors in Bay 4. However, the e-mail alluded to by General Counsel is one which Goodreau claims was shown to him by Gulaszewski, a claim which, as noted, I have rejected as not credible. The e-mail in question was never produced, and Giacherio credibly denied ever showing Goodreau such a document. Also rejected as not credible is L. Lewis' claim that Gulaszewski told him he had been instructed by Pinion in an e-mail to assign L. Lewis to the clean up of Bay 4. In short, the testimonial evidence cited by General Counsel in support of her claim of antiunion animus by the Respondent against L. Lewis is simply not credible. General Counsel has, consequently, failed to make a prima facie showing that the assignment of L. Lewis to do cleanup work in Bay 4 was motivated by antiunion considerations. Accordingly, this allegation is found to be without merit.

b. The May 1 lockout and partial recall of employees

I also find no merit to the complaint allegation that the Respondent's May 1 lockout, and subsequent partial recall of employees, was discriminatorily motivated and unlawful under Section 8(a)(3) and (1) of the Act. It is well-settled that an employer's decision to lock out employees for the sole purpose of pressuring them to accept its bargaining proposals does not, without more, violate Section 8(a)(1) or (3) of the Act. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). A lockout motivated by antiunion considerations is, however, unlawful. In deciding whether an employer's lockout is motivated by antiunion animus, the Board applies the standards developed by the Supreme Court in *NLRB v. Great Dane Trailers*, Inc., 388 U.S. 26 (1967). Under *Great Dane*, if an employer's alleged discriminatory conduct is found to be "inherently destructive" of employee rights, then proof that the alleged misconduct was motivated by antiunion considerations is not required, and the Board may find an unfair labor practice even if there is evidence to show that the employer was motivated by business considerations. However, proof of an antiunion motive is required where the effect of an employer's discriminatory conduct is only "comparatively slight," and the employer has demonstrated a legitimate and substantial business justification for its actions. In either case, once it has been shown that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives. Id at 34.

The General Counsel contends that the Respondent's decision to initiate a lockout was motivated by antiunion animus, its purpose being, she argues, to undermine or eliminate the Union as its employees' bargaining represen-

[21] In *U.S. Service Industries*, supra, cited by the General Counsel, the Board, inter alia, found unlawful an employer's statement to unfair labor practice strikers that they could be permanently replaced. Unlike that case, the strikers here are economic, not unfair labor practice, strikers, making *U.S. Service Industries* inapposite to the present situation.

tative, and not, as the Respondent asserts, to pressure the Union and employees into accepting its April 28 contract proposal. The General Counsel, however, has presented no credible evidence to show that the Respondent harbored animus towards the Union. The only evidence cited by the General Counsel in support of her position consists of the above rejected claims by various employees that they were threatened, overtly or otherwise, by antiunion remarks and other subtle statements purportedly made to them by certain supervisors and/or managers of the Respondent beginning sometime in 2003 and continuing beyond the onset of the lockout. As found above, with the exception of the videotaping of picketers, the Respondent did not engage in any of the 8(a)(1) or (3) conduct alleged in the complaint. Accordingly, I find no credible evidence to support the General Counsel's claim that the Respondent engaged in the type of misconduct that would qualify as "inherently destructive" of employee rights under *Great Dane*, supra. The sole 8(a)(1) violation found, e.g., the videotaping of picketers, does not constitute, nor was it alleged by the General Counsel to be, conduct of the type that would frustrate or hinder the collective bargaining process as is required to satisfy the *Great Dane* "inherently destructive" standard.[22]

Contrary to the General Counsel, I find that the Respondent's sole intent in locking out employees was to pressure them and the Union into accepting its April 28 contract proposal. The Respondent, in the past, had successfully used the lockout as a means of obtaining an agreement with the Union. Thus, during the parties' 2000 contract negotiations, the Respondent conducted a 1-day lockout that culminated in an agreement being reached by the parties. I am convinced that Goodman, having successfully employed the lockout during the prior negotiations to achieve his bargaining goals, decided again to resort to this permissible tactic after employees rejected his April 28 contract proposal. There is no evidence to show, nor has any claim been made here, that the Respondent had not been bargaining in good faith or was attempting to avoid reaching agreement before implementing the lockout. To the contrary, the evidence shows that the parties engaged in numerous bargaining sessions prior the lockout, and were able to reach agreement on certain issues. In the absence of evidence showing that the lockout had some other unlawful objective, and as there is no evidence to refute the Respondent's claim that it was simply trying to force the Union into accepting its contract offer, a legitimate objective under *American Shipbuilding*, I find that the lockout was, at its inception on May 1, a lawful one, and did not violate Section 8(a)(3) and (1) of the Act, as alleged.

The General Counsel also contends that the Respondent's decision to recall only employees in the skilled classifications (schumag, wean line, maintenance, rotomag tester, millwright), and not employees in its support job classifications (Radio Crane, Lift truck/Hi-Lo operators, Coil End operators, bar blast operators, Tool Crib operators), was discriminatorily motivated and violated Section 8(a)(3) and (1) of the Act. (GC Br. 45). I disagree.

An employer's decision to lock out some unit employees, but not others, is not unlawful if the employer has a valid business justification for doing so. *Midwest Generation*, 343 NLRB 69 (2004); also, *Bunting Bearings Corp.*, 343 NLRB No. 479 (2004). When first implemented on May 1, the lockout, as noted, affected all unit employees. In an effort to continue its operations following the lockout, the Respondent hired some temporary replacement employees as support staff and utilized management personnel to run its various machines, while seeking through help wanted ads to obtain skilled employees. While it was able to hire a sufficient number of temporary employees as support staff, the Respondent had little or no success in finding the skilled employees needed to operate its various machines and equipment. Some 3 weeks into the lockout, the Respondent was having difficulty maintaining pre-lockout production levels and began suffering losses in production and material. It was these factors, according to both Goodman and Pinion, that led to the decision sometime after May 24, to begin recalling the skilled employees back to work. The Respondent's ability to hire a sufficient number of temporary replacements to handle the support functions reduced pressure on it to recall the unskilled workers from lockout, while its inability to fully staff and operate its machinery using only management personnel proved more than it could handle, compelling the Respondent to recall the skilled employees to perform such functions. In these circumstances, the Respondent's stated decision for recalling only the skilled employees back to work made perfect sense.

The motivation for recalling only the skilled employees was therefore an economic one, prompted purely by business, not antiunion reasons. No credible evidence was presented by the General Counsel to refute Goodman's and Pinion's stated reason for the recall of some, but not all, of the unit employees. As with the 8(a)(3) allegation regarding the lawfulness of the lockout itself, the General Counsel here again relies on the various rejected 8(a)(1) allegations of misconduct by the Respondent to support her claim that the partial recall of unit employees was motivated by antiunion animus and thus unlawful. Having found those 8(a)(1) allegations to be without merit, I find that the General Counsel, as with the lockout, has not presented any credible evidence to support her further claim that the partial recall of unit employees by the Respondent was discriminatorily motivated by antiunion animus. The General Counsel has consequently failed to meet her *Wright Line* burden of showing that the recall of some, but

[22] The *Great Dane* "inherently destructive" standard applies only to those actions "that exhibit hostility to the process of collective bargaining," and refers to conduct that has "far reaching effects which could hinder future bargaining; i.e., conduct that creates visible and continuing obstacles to the future exercise of employee rights." See, *Roosevelt Memorial Medical Center*, 348 NLRB No. 64 (2006); Also, *Bud Antle, Inc.*, 347 NLRB No. 9 (2006).

not all, of the unit employees was motivated by antiunion reasons. Accordingly, the allegation that the partial recall was unlawful under Section 8(a)(3) and (1) is found to be without merit.

3. The 8(a)(5) and 1) allegations

a. The direct dealing allegation

The General Counsel contends that the Respondent's failure to notify the Union before recalling the skilled employees back to work was inconsistent with its past practice and with the notice requirements of the expired collective-bargaining agreement, and constituted unlawful direct dealing with employees. I disagree.

Initially, as previously discussed, all recalled employees, with the exception of K. Lewis who was asked to return as a schumag operator on the "4D" machine rather than as a coil end operator, the position he held just before the lockout, returned to their former positions at the same rate of pay, benefits, and other terms and conditions of employment. The Respondent did not negotiate with any of the recalled employees and simply instructed them by phone calls and letters that they were to return to their former positions on certain specified dates.

Regarding the past practice, there is no evidence that the Respondent had established a practice of giving the Union prior notice of a recall during a lockout. Aside from the current lockout, the only other lockout referenced in the record is one that occurred during the parties' 2000 contract negotiations. That lockout, as noted, lasted just 1 day. No credible evidence, however, was produced to show how the recall from that lockout was conducted, or whether the Union was ever notified in advance as to when or how the locked out employees were to be recalled. The only testimony adduced regarding that lockout came from Wilson, whose knowledge as to what transpired during that lockout was shaky at best and based not on any direct knowledge of those events, but rather on hearsay information he purportedly received from someone he identified only as "Perry," presumably the Union's chief steward at the time. Perry did not testify. I give no weight to Wilson's testimony regarding how the recall was conducted during the 2000 lockout, or whether the Union received prior notice of said recall. In sum, the General Counsel has produced no reliable or credible evidence to show that the Respondent had an established practice of providing the Union advance notice when recalling employees from a lockout.

As to art. VIII, Sec. 7 of the parties' expired agreement requiring the Respondent notify "the Bargaining Committee of all employees hired, to be laid off, or recalled to work," I am not convinced that this provision applied to lockouts and, if so, that it was indeed violated by the Respondent. There is, for example, nothing in the language of the provision itself to indicate that the recall notification was intended to apply not just to layoffs but also to lockouts. More importantly, however, the wording of the provision speaks only of providing notification to the Union without expressly stating when such notification was to be made. Thus, it is not clear that the Respondent was required to give the Union advance notice of the recall; rather, on its face, the provision speaks only of notification to the Union of all employees who have been hired, to be laid off, or *recalled* to work. As the term "recalled" is used in the past tense, it may reasonably be argued that what was required of the Respondent under this provision was notification to the Union that a recall had taken place, not necessarily prior notice that a recall was to occur. If so, then the Respondent did comply, since, during the June 1 bargaining session, soon after recalls began in late May, it notified the Union of the recall and identified which employees were being recalled. At best, the language of Article VIII, Sec. 7 is too vague and ambiguous to support a finding that the Respondent was required to give the Union prior notice of its decision to recall certain of its locked out skilled employees. Accordingly, I find that the Respondent's failure to give the Union advance notice of its decision to begin recalling locked out employees, and its conduct in directly contacting employees who were being recalled, did not violate Section 8(a)(5) and (1) of the Act, as alleged.

b. The August 9 new paradigm proposal

Finally, the General Counsel, as previously stated, contends that even if the lockout is found to have been lawful when implemented on May 1, it was rendered unlawful as of August 9, when the Respondent presented its "new paradigm" proposal to the Union. The "new paradigm" proposal, she explains, was regressive in nature in that, unlike the Respondent's April 28 proposal, it called for, inter alia, substantial pay cuts and the elimination the seniority rights for bargaining unit employee. She argues that the presentment of the regressive "new paradigm" proposal, when viewed in light of other circumstances, including Gunsberg's alleged refusal to describe or discuss its contents which she contends was suggestive of a "take it or leave it" attitude, and the other alleged unfair labor practices purportedly committed by the Respondent, demonstrates that the Respondent was not bargaining in good faith and was bent on frustrating the bargaining process and avoid reaching agreement. She therefore contends that the Respondent's conduct in presenting a bad faith regressive proposal to the Union violated Section 8(a)(5) and (1), and transformed the lockout from a lawful, to an unlawful, one as of August 9.

The Respondent, not surprisingly, denies the allegation that it engaged in bad faith bargaining by presenting the Union with its "new paradigm" proposal. While admitting that its August 9 proposal deviated from its April 28 proposal, the Respondent argues that the changes proposed in its new August 9 proposal, including placement of all nonskilled employees into a new general support staff classification, and reducing the wages for all employees in that classification to match the wage rate at which it was able to hire the temporary employees during the lockout, reflected its decision to adopt a new method of operation consistent with the realities of the marketplace of which it

became cognizant during the lockout. It contends that, having weathered its labor dispute with the Union, it was free to use its new-found strength to obtain contractual terms it deemed more favorable through a reduction or withdrawal of its April 28 proposal.

I agree with the Respondent. Section 8(d) of the Act sets forth the bargaining requirements for parties engaged in a collective-bargaining relationship. Thus, under Section 8(d), an employer is required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising there under." This "meet and confer" requirement, however, "does not compel either party to agree to a proposal or require the making of a concession." In determining whether an employer has bargained in good faith, the Board evaluates the entire course of bargaining and all the relevant circumstances and, based on that evaluation, decides whether the employer was lawfully engaging in hard bargaining to achieve a contract that it considers desirable, or was unlawfully endeavoring to frustrate the possibility of arriving at any agreement.

Here, no evidence has been presented, nor claim or allegation made by the General Counsel, that the Respondent at any time before or after presenting its April 28 proposal (but before its August 9 proposal), failed to bargain in good faith or was seeking to avoid a contract with the Union. Indeed, the fact that the Respondent kept its April 28 proposal on the table for more than 3 months, e.g., until August 9, after being rejected by the Union, and that it continued meeting and bargaining with the Union over its proposal after the lockout began, clearly indicates that the Respondent was trying to reach, not avoid, agreement with the Union.

Soon after the May 24 bargaining session, the Respondent, believing that the labor dispute might last longer than anticipated, and hoping to avoid further production and inventory losses resulting from its decision to continue operations using temporary employees and management personnel only, felt compelled to recall its locked out skilled employees to work. However, of the 31 skilled employees recalled, only 14, or less than half, agreed to return to work. The other 17 skilled employees, as evident from Hayosh's June 2 letter and as found above, chose instead to remain out on strike until all unit employees were recalled to work.

With the 14 skilled employees who returned to work, and its ability to train the temporary replacements hired to run its machines in a relatively short period of time, the Respondent, by August 9, was able to restore production to near normal levels and thereby meet its customers' needs and demands. So testified Goodman and Pinion. Their testimony in this regard is bolstered by R Exh-8, which shows that while the Respondent's production of steel in May, right before it began the recall, was approximately 25 percent of what it had been in April, its steel production in June, after the recall began, increased to 50 percent of what it had been before the lockout, increased some more in July, and by August, when the Respondent presented its "new paradigm" proposal, had reached a little over 80 percent of its pre-lockout steel production rate.

Having weathered the strike called by employees following their recall, and having discovered from its recruitment of temporary employees that it was able to hire employees into support positions at the $14.50/hour rate with relative ease, the Respondent decided to replace its April 28 proposal with its August 9 "new paradigm" proposal. The August 9 proposal, as noted, did not alter any prior agreements that had been reached by the parties during negotiations. However, and as the Respondent readily admits (R. Br.:15), under the new proposal, certain job classifications that were previously classified as skilled but which were readily available in the marketplace would, along with other unskilled classifications, be combined into a new "support" classification and paid at the $14.50/hr rate, reflecting the market rate. On the other hand, under the August 9 proposal, skilled employees, would receive pay raises. Unlike the August 9 proposal, the withdrawn April 28 proposal would have provided pay raises for all employees, skilled and unskilled.

I agree with the General Counsel that the August 9 proposal which, inter alia, reduced wages for employees in the support classification, was somewhat regressive when compared to the Respondent's April 28 proposal. The Board, however, has held that absent other evidence of bad faith, regressive contract proposals are not violative of the Act. *Telescope Casual Furniture, Inc.*, 326 NLRB 588 (1998); *National Steel and Shipbuilding Co.*, 324 NLRB 1031, 1041 (1997); *Frontier Hotel & Casino*, 323 NLRB 815, 836 at fn. 15 (1997) (regressive proposals are not per se indicia of surface bargaining), citing *Reichhold Chemicals*, 288 NLRB 69 (1988); *Hendrick Mfg. Co.*, 287 NLRB 310 (1987). Other than pointing to the Respondent's withdrawal of its April 28 proposal and to the regressive nature of the August 9 proposal, the General Counsel has produced no credible evidence to show that the Respondent had been engaging in bad faith bargaining at any time prior to August 9, or that it did so after presenting the latter proposal. Further, the Respondent's withdrawal of its April 28 proposal does not per se establish the absence of good faith and is only one factor that is considered in the totality of circumstances test. *White Cap, Inc.*, 325 NLRB 1166, 1168 (1998). As pointed out in *White Cap*, supra, the Board examines the respondent's explanation for its change in position to determine whether it was undertaken in bad faith and designed to impede agreement.

As found above, when presented to the Union on August 9, the "new paradigm" proposal was fully explained, and it was made clear to the Union that this was not a final proposal but one which was open to negotiations. Thus, there was no "take it or leave it" position taken by the Respondent, as claimed by the General Counsel. In sum, I find that the Respondent has provided a good-faith explanation for its change in bargaining position on August 9, and that its presentment of its "new paradigm" proposal on that date was not a product of, or constituted, bad faith bar-

gaining. The complaint allegation that the August 9 proposal violated Section 8(a)(5) and (1) of the Act is, therefore, found to be without merit and shall be dismissed. The General Counsel's further claim, that the lockout was rendered unlawful as of August 9, is likewise rejected as without merit.

CONCLUSIONS OF LAW

By engaging in the surveillance, through videotaping, of employees participating in lawful picketing activity outside its facility, the Respondent engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to post an notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Hercules Drawn Steel Corporation, Livonia, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of employees engaged in union activities and protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2005.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., December 8, 2006.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT engage in surveillance of our employees' union activities by videotaping their activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."